SL 1 PAGE 1

No. 99-1613

Supreme Court, U.S.
FILED
JUN 26 2000
CLERK

RECEIVED
JUN 19 2000
UNIVERSITY of MONTANA
SCHOOL of LAW

In The
SUPREME COURT OF THE UNITED STATES

ROBERT SHAW, LARRY BEARLEY,
MICHAEL MAHONEY, MYRON BEESON,
AND RICHARD S. DAY,

Petitioners,

-v-

KEVIN MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Kevin Murphy, being first duly sworn according to the law, depose and say that I am the Respondent in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

Answer: No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Answer:

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Answer: August 1994 - $100.00 per week.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest dividends, or other source?

Answer: No.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

Answer:

3. Do you own any cash or checking or savings account?

Answer: No.

a. If the answer is yes, state the total value of the items owned.

Answer:

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

a. If the answer is yes, describe the property and state its approximate value.

Answer:

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Kevin Murphy

Subscribed and Sworn to Before
me this 15th day of June, 2000.

Carol J McCracken
Notary Public State of Montana
Residing at Shelby, Montana
My Commission Expires: 02/01/04

Carol J. McCracken
NOTARY PUBLIC for the State of Montana
Residing at Shelby, Montana
My Commission Expires February 1, 2004

ACCTSTMT

CCA CROSSROADS CORRECTIONAL CENTER
Inmate Account Statement #53
For Account 1 - From: 01/01/2000 To: 06/21/2000

06/21/2000

Murphy, Kevin

Facility ID: 12810

Location: A217L

Type	Trans. Date	Deposit Source	Trans. Nbr	Beg. Balance	Trans. Total	Ending Balance
D	01/11/2000	WAGES	50867	0.27	2.50	2.77
D	01/18/2000	MAIL	51288	2.77	10.00	12.77
P	01/20/2000		51465	12.77	12.76	0.01
D	02/08/2000	CORRECTION	52341	0.01	200.00	200.01
D	02/09/2000	WAGES	52556	200.01	7.50	207.51
P	02/11/2000		52757	207.51	94.00	113.51
M	02/11/2000		52830	113.51	100.00	13.51
P	02/16/2000		53013	13.51	8.01	5.50
P	02/18/2000		53224	5.50	-1.51	7.01
M	02/19/2000		53263	7.01	6.00	1.01
D	03/10/2000	WAGES	54435	1.01	12.50	13.51
P	03/14/2000		54703	13.51	13.39	0.12
D	04/10/2000	MAIL	56369	0.12	30.00	30.12
P	04/12/2000		56534	30.12	21.45	8.67
P	04/26/2000		57366	8.67	8.48	0.19

Beginning Balance For Date Range :	0.27
Total Net Transactions For Date Range :	-0.08
Calculated Ending Balance For Date Range :	0.19
Total Records Printed :	15

RECEIVED
JUN 26 2000
UNIVERSITY of M... ...
SCHOOL of LA...

I certify this true + correct
Business Manager L. Lann
June 22, 2000

Supreme Court, U.S.
FILED
JUN - 6 2000
CLERK

No. 99-1613

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

ROBERT SHAW, LARRY BEARLEY,
MICHAEL MAHONEY, MYRON BEESON,
AND RICHARD S. DAY,

Petitioners,

-V-

KEVIN MURPHY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY T. RENZ
Criminal Defense Clinic
School of Law
University of Montana
Missoula, Montana 59812
(406) 243-4823

Counsel of Record

QUESTION PRESENTED

May state prison officials, consistent with the First Amendment, punish an inmate after he writes a letter to another inmate, who has been charged with assaulting a corrections officer, where (a) the letter offered factual information and other general advice relating to the defense of such charge, (b) the prison has no rule that forbids prisoners from writing letters to one another, and (c) the punishment is based solely on the objections that those officials have to the contents of the letter?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. BECAUSE MONTANA STATE PRISON DID NOT FORBID OR REGULATE INMATE-TO-INMATE CORRESPONDENCE, THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THOSE OF OTHER CIRCUITS 4

A. This Case Is About Regulation of Content of Communication, Not About Regulation of Inmate Law Clerks. 4

B. This Court Would Have to Confront Other Questions of Law and Policy, Not Discussed in the Court of Appeals' Opinion, Which Are Raised by the Petition. 8

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH *TURNER v. SAFLEY* AND RAISES NO ISSUE OF NATIONAL IMPORTANCE 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Adams v. James, 784 F.2d 1077 (11th Cir. 1986) 9

Bass v. Singletary, 143 F.3d 1442 (11th Cir. 1998) 4, 7

Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964) 5

Buise v. Hudkins, 584 F.2d 223 (7th Cir. 1978) 5

Cornell v. Woods, 69 F.3d 1383, 1388 (8th Cir. 1995) 5

Ex parte Hull, 312 U.S. 546 (1941) 9

Gassler v. Rayl, 862 F.2d 706 (8th Cir. 1988) 4, 6-8

Gibbs v. Hopkins, 10 F.3d 373 (6th Cir. 1993) 4, 7

Johnson v. Avery, 393 U.S. 483 (1969) 4

Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) 10

Lewis v. Casey, 518 U.S. 343 (1996) 7

Meachum v. Fano, 427 U.S. 215 (1976) 5

NAACP v. Button, 371 U.S. 415 (1963) 5

Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970) 9

Pell v. Procunier, 417 U.S. 817 (1974) 5

Smith v. Maschner, 899 F.2d 940 (10th Cir. 1990) 4, 6, 7

Superintendent v. Hill, 472 U.S. 445 (1984) 11

Thornburgh v. Abbott, 490 U.S. 401 (1989) 6, 10-12

Tighe v. Wall, 100 F.3d 41 (5th Cir. 1996) 4, 7

Turner v. Safley, 482 U.S. 78 (1987) 4-8, 10-12

STATEMENT OF THE CASE

In early 1995 Montana State Prison inmate Pat Tracy was charged in Montana district court with assaulting correctional officer Glen Galle. In accordance with prison policy, Tracy was moved into a segregation block located in the Prison's Maximum Security unit. At the time Respondent Kevin Murphy was housed on the "high security" side of Montana State Prison where Tracy had been housed.

Although Tracy had a court-appointed attorney, he asked for Murphy's help on his case. Murphy had been designated as a law clerk by the Prison and had provided Tracy with legal help on many occasions in the past. The Prison's Librarian advised Tracy that high security inmates, like Murphy, were no longer allowed to visit the Maximum Security unit. A legal clerk from the low security area of the prison made arrangements to see Tracy. That law clerk, however, had a reputation for breaching confidence and Tracy understandably refused to speak with him.

Tracy's requests and the allegations against Tracy came to Murphy's attention. Murphy looked into reports that Officer Galle had made sexual advances toward inmates. His investigation began to bear fruit as Murphy learned that a number of inmates had circulated a petition complaining of Galle's wrongful conduct in other matters.

Thus, on February 16, 1995, Murphy wrote a letter to Tracy. In this letter Murphy told Tracy that he could no longer go the Maximum Security unit but,

> I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation.

> . . .
>
> Another point is that he grabbed you from behind. You tell your lawyer to get a hold of me on this. Don't take a plea bargain unless it's for no more time.
>
> . . .
>
> I will write again when I get this thing against Galle finished.

App. 46

On February 17, 1995, corrections officer and defendant Robert Shaw intercepted this letter, read it, and charged Murphy with three major misconduct violations. Shaw alleged that Murphy violated Montana State Prison Rule 009 (Insolence), Rule 022 (Interference with Due Process Hearings), and Rule 025 (Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution). The Insolence charge alleged:

> . . . In this letter, Inmate Murphy accused CO Galle of being an overzealous guard who punishes and harasses inmates for personal pleasure. Inmate Murphy also accused CO Galle of making homosexual advances towards inmates. Inmate Murphy stated that CO Galle retaliated against Murphy by writing him up on two [word unreadable] infractions.

The charge of "Interference with Due Process Hearings" alleged:

> . . . In this letter Murphy tries to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of. Inmate Murphy states he tried to "do something" about CO Galle, but he (Murphy) was retaliated against. There is no evidence of any of the statements in this letter to be fact.

The Prison hearing officer acquitted Murphy of the charge of "Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution." He found Murphy guilty of violating Rule 009 (Insolence) and Rule 022 (Interference with Due Process Hearings.) Bearley sentenced Murphy to ten days detention and suspended the sentence. Warden Mahoney denied

Murphy's appeal.

Murphy sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. After Murphy and the Petitioners moved for summary judgment, the District Court granted summary judgment in the Petitioners' favor and dismissed the complaint. Murphy filed a timely appeal. The Court of Appeals reversed.

At this point several facts (omitted from the Petition) should be noted. No Prison policy governing association rights was at issue. Montana State Prison did not "write up" or punish Murphy for writing to Tracy. The Prison did not "write up" or punish Murphy for attempting to contact Tracy in the Maximum Security Unit of Montana State Prison. The Prison did not "write up" or punish Murphy for some such thing as acting outside the scope of his inmate legal clerk duties. Murphy was not punished for "jailhouse lawyering."

The Prison also did not prohibit inmate-to-inmate correspondence. Resp. App. 5, ¶¶ 3,4. The Prison limited its regulation of inmate-to-inmate correspondence to inspection of inmate mail and confiscation of mail that violated its mail policy. Murphy did not challenge that regulation. The Prison cited Murphy and punished him solely because of the content of his letter.

Tracy eventually pled guilty to felony assault without the benefit of the information in Murphy's letter. App. 49. These facts were undisputed in the record before the courts below.

REASONS FOR DENYING THE WRIT

I. BECAUSE MONTANA STATE PRISON DID NOT FORBID OR REGULATE INMATE-TO-INMATE CORRESPONDENCE, THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THOSE OF OTHER CIRCUITS

A. This Case Is About Regulation of Content of Communication, Not About Regulation of Inmate Law Clerks.

The Petitioner contends that the Circuit Court of Appeals' decision in this case conflicts with the holdings of *Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993); *Gassler v. Rayl*, 862 F.2d 706, 708 (8th Cir. 1988); *Smith v. Maschner*, 899 F.2d 940, 950 (10th Cir. 1990); *Tighe v. Wall*, 100 F.3d 41, 43 (5th Cir. 1996); and *Bass v. Singletary*, 143 F.3d 1442, 1446 (11th Cir. 1998). We now examine that contention.

There is a great distinction between "writ-writing" and Murphy's letter. A jailhouse lawyer advises, assists, or aids another inmate in the preparation of writs or other legal matters. *Johnson v. Avery*, 393 U.S. 483, 484, 489 (1969). Montana State Prison's policies likewise describe an inmate law clerk's functions. The functions include (1) "counsel with complaining inmates," (2) "define issues in matters to be addressed through legal channels," (3) instruct inmates in document preparation and legal research, instruct inmates on procedures in civil rights and post-conviction matters "and other forms of asserting claims."

Murphy's letter does not fit well under these functions. Rather, his letter is akin to that from a witness in a legal proceeding. ("Tell your lawyer to get a hold of me on this (and this is why)," Murphy wrote.) This is witness language, not lawyer language. This letter was Murphy's only communication with Tracy and is adequately addressed by this Court's holding in *Turner v. Safley*, 482 U.S. 78 (1987).

Montana State Prison may be able to regulate such communications– inmate-to-inmate correspondence–provided its regulation satisfies *Turner*. But it cannot do so under the guise of regulating writ-writing. In any event, the Prison promulgated no regulation that prohibited Murphy's communication.

Notwithstanding the Petitioners' attempt to recast this as a case involving the rights of inmates who are legal clerks, whether Murphy was or was not an inmate law clerk is immaterial. Murphy was punished for the content of his letter, not because he "exceeded" any right that a law clerk has in prison.

A convicted felon "retains a variety of important rights that the courts must be alert to protect." *Meachum v. Fano*, 427 U.S. 215, 225 (1976). These rights include "those first amendment rights that are not inconsistent with his status as a prisoner or with legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). "Outside prison walls, the Supreme Court has recognized that 'the right to cooperate in helping and advising one another in asserting their rights' is protected by the First Amendment in a variety of contexts." *Buise v. Hudkins*, 584 F.2d 223, 230 (7th Cir. 1978) (citation omitted); *see Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964) (holding that union members and officials could not be prohibited from advising members to obtain legal advice about their injuries or from recommending specific attorneys); *NAACP v. Button*, 371 U.S. 415 (1963) (holding that NAACP lawyers and staff could not be prohibited from advising people that their rights had been violated or from referring them to certain attorneys); *cf.*, *Cornell v. Woods*, 69 F.3d 1383, 1388 (8th Cir. 1995) (holding that right to freely participate in government investigations is not inconsistent with one's status as a prisoner).

Prisons, however, retain the power to limit, regulate, or proscribe inmates' first amendment rights, so long as the prison's regulation is rationally related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). The Court of Appeals' decision in this case adheres to *Turner* and *Abbott* and does not conflict with other Circuits' decisions, which are limited to prisons' power to regulate jailhouse lawyers.

The Court of Appeals' decisions relied upon by the Petitioner address a different kind of right: the claimed "right" to hold a position as an inmate law clerk. In *Gassler* the inmate claimed that his transfer and loss of his law clerk position was retaliatory and violated his "right" to assist other inmates with legal claims. The Eighth Circuit accurately analyzed the claim as a claim of a right to hold a particular position or perform a particular function and concluded that the inmate had "no right to be . . . a jailhouse lawyer independent of the right of access to the court." *Gassler*, 862 F.2d at 707-708. If an inmate chose to assert a retaliation claim, it would have to be versed in access to the courts terms and assert that the prison's retaliation denied other inmates access to the courts. Put differently, the Eighth Circuit's opinion addressed a case in which the inmate claimed a right to be a jailhouse lawyer, not a case in which the inmate, whether a jailhouse lawyer or not, was punished for the content of his communication. Here the right at issue is the right to write letters to other inmates. That right is shared by inmates regardless of their status.

Similarly, in *Smith* the inmate complained that he had been punished because of his "jailhouse lawyering" on behalf of himself and others. *Smith*, 899 F.2d at 892. The inmate claimed retaliation for his activity, not for the content of any letter. Notably, *Smith* is somewhat

consistent with the decision in the case at bar. The Tenth Circuit concluded that the inmate's own litigation was a "form of political expression and political association much as the Supreme Court has held litigation to be for certain organizations outside the prison setting . . . . The right of free expression is cherished for its force as an agent of social change and not only as a right of self-interested individuals." *Id.* at 950. It was on this First Amendment ground that the Court of Appeals allowed the inmate to pursue his claim. *Id.*

Gibbs relied upon *Gassler* and *Smith*. Like the inmates in those cases, the inmate in *Gibbs* claimed that he suffered retaliation for "jailhouse lawyering." *Gibbs*, 10 F.3d at 375-76. The Sixth Circuit noted, "there is technically no independent right to assist" so long as inmates have other means of accessing the courts. *Id.* at 378. As with *Gassler*, the Sixth Circuit's focus was on the "right" to function as a legal clerk, rather than upon the right to be free from punishment for the content of any communication.

Tighe continued the *Gassler* line of decisions and, like those decisions, addressed a claim of retaliation. The inmate claimed a First Amendment right to provide legal assistance to other inmates. *Tighe*, 100 F.3d at 43. The Fifth Circuit, as had its predecessors, held that there was "no right to be . . . a jailhouse lawyer independent of the right of access to the court." *Id.* Similarly, in *Bass*, inmates challenged a prison regulation that forbade inmate-to-inmate circulation of legal materials. *Bass*, 143 F. 3d at 1443. The Eleventh Circuit engaged in a *Turner* analysis of the regulation. It noted, in dictum, that other circuits had not recognized an independent First Amendment right to provide legal assistance. *Id.*, 143 F.3d at 1446.

This line of cases describes a set of principles. First, prisons are free to regulate inmates who act as inmate law clerks, consistent with *Turner* and with *Lewis v. Casey*, 518 U.S. 343

(1996). Second, inmates who are accorded the opportunity to work as law clerks have no personal, independent right to continue in that position. Neither principle was at stake in the case at bar.

Murphy was not punished for assisting or attempting to assist Tracy. There was and still is no Montana State Prison rule that forbids Murphy or any other inmate from corresponding or speaking to another inmate about legal proceedings. Perhaps Montana State Prison could have regulated or prohibited such communications, *but cf.*, *Turner*, 482 U.S. at 81 (stating that prison regulated inmate-to-inmate correspondence, but did not regulate correspondence "concerning legal matters"), but it did not. Unlike the inmates in the *Gassler* line of decisions, Murphy was not punished for the acts of speaking, writing, or giving legal advice. He was punished for the content of his letter.

Once we recognize that the issue is not one of regulating or prohibiting communication but punishing for the content of a letter permitted under the Prison's policies, the question becomes purely one of the right to free speech. As a result, it does not matter if we measure that right as a First Amendment right retained by an inmate or as a First Amendment right of a jailhouse lawyer. The right is measured under a *Turner* analysis. The Court of Appeals engaged in a proper *Turner* analysis in this case.

B. This Court Would Have to Confront Other Questions of Law and Policy, Not Discussed in the Court of Appeals' Opinion, Which Are Raised by the Petition.

Whether we characterize Murphy's letter as factual information from a lay person or as advice from a jailhouse lawyer, Murphy's communication spoke to proceedings outside the Prison's walls. By stretching its "Insolence" and "Interference with Due Process" rules to fit the

content Murphy's letter, Montana State Prison extended its authority beyond the prison and into the court room where it has no interest in order and discipline. The Prison conferred upon itself the authority to determine whether evidence offered for use at a criminal trial was "true." If the Prison's regulations are given this breadth, prison officials could punish most prisoners who offer to testify on behalf of an inmate and against a staff member. Under its application of Rule 022 (Interference with Due Process Hearings), the Prison may threaten any inmate who volunteers to offer testimony on behalf of another prisoner when that evidence alleges employee misconduct. Under its application of Rule 009 (Insolence), the Prison may threaten to punish an inmate for tendering evidence when the evidence may "harass or cause alarm in an employee," which is Rule 009's definition of insolence.

The federal courts have historically condemned and prohibited such pre-clearance by prison officials. *Cf.*, *Ex parte Hull*, 312 U.S. 546 (1941) (holding that prison officials could not screen habeas petitions and prohibit mailing those that they deemed frivolous); *Adams v. James*, 784 F.2d 1077, 1083 (11th Cir. 1986) (Clark, J., concurring in part) (noting that frivolousness and good faith are concerns of the courts and not the prison administration); *Nolan v. Scafati*, 430 F.2d 548, 551 & n.4 (1st Cir. 1970) (holding that prison could not refuse to mail an inmate's letter to the Civil Liberties Union because prison believed it contained "lies"). The truthfulness of the information proffered by Murphy is a judicial, not a penological, interest.

The Court of Appeals' narrow opinion avoided the question of whether a prison may regulate or punish an inmate's participation or attempt to participate in legal proceedings outside the prison. This Court would be faced with deciding the question of whether the inmate's participation is an interest of the courts or an interest that may be regulated by prison officials

who might prefer that the inmate's story never be told.

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH *TURNER v. SAFLEY* AND RAISES NO ISSUE OF NATIONAL IMPORTANCE

The Petitioners contend that the Court of Appeals' decision conflicts with *Turner* and its progeny. They first assert that the Court of Appeals' decision abrogates this Court's holding in *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977). They reason that the Court of Appeals grounded its decision in this case, in part, on First Amendment associational rights and that this creates a rule that runs contrary to *Jones*.

In *Jones* this Court upheld a prison regulation that prohibited inmates from soliciting other inmates' membership in a labor union. In the case at bar, there is no similar regulation or prohibition. Had Montana State Prison prohibited inmates from corresponding with inmates in its Maximum Security Unit, had it punished Murphy for doing so, and had the Court of Appeals found that to be a violation of Murphy's associational rights, then the Petitioners would have a complaint. But that is not what happened in this case. The Court of Appeals' decision does not conflict with *Jones*.

The Petitioners assert that the Court of Appeals' decision departs from *Turner*'s and *Abbott*'s holdings. They claim, "the Ninth Circuit's decision makes it impossible for a prison to ban inmate-to-inmate correspondence because inmates must have some method by which to exercise their independent constitutional right to exercise legal assistance." Pet. at 17. This is, of course, an exaggeration. We do not know if the Court of Appeals' decision makes it impossible because Montana State Prison has never attempted such a ban. Until it does so, this Court will have no facts upon which to evaluate the Petitioners' claim.

In contrast to the Petitioners'claim, the Court of Appeals stated that the Prison would be free to regulate Murphy's speech, as well as his activity, consistent with *Turner* and engaged in a *Turner* analysis of both. App. 8-15. The case before the Court of Appeals, however, lacked two key factors found in *Turner*. First, Montana State Prison did not regulate or prohibit inmate-to-inmate correspondence, short of inspecting letters. Thus, the Petitioners' claimed power to regulate inmate-to-inmate correspondence was not at issue. *Turner* and *Abbott* command deference to the judgments of prison officials. Montana State Prison's officials determined that it was not necessary to the safety, security, and order of the Prison to prohibit inmate-to-inmate correspondence. Those same officials determined that Murphy's letter did not disrupt or interfere with the Prison's security or order. Those are judgments entitled to deference.

Evidence was also lacking in this case. In *Turner*, this Court required evidence of the prison's asserted interests, *Turner*, 482 U.S. at 98, and struck down the prison's marriage prohibition in that case because "petitioners have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing [violent love triangles]." In the case at bar, the Court of Appeals recognized that Montana State Prison had a legitimate interest in security and order. App. p. 11. This interest was expressed, however, in the Prison's "insolence" and "interference with due process" regulations. The Court of Appeals found the evidence of the nexus between these regulations and Murphy's punishment to be "weak." App. p. 13.

Murphy had been found not guilty of violating Rule 025, "Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution." This finding is significant because only "some evidence" would have been necessary to support a guilty finding. *Superintendent v. Hill*, 472 U.S. 445, 455 (1984). In short, this case lacks the facts necessary to

address the issue that the Petitioners present.

Contrary to the Petitioners' claims, Murphy's right to correspond without fear of punishment for his letter's contents, or his right to act as a jailhouse lawyer are not absolute. The Prison remains free to regulate these activities consistent with *Turner* and *Abbott*. The Petitioners failed in the Court of Appeals because the ~~Prison had~~ not regulated those rights, not because the Court of Appeals created a new right.

Since this case was one in which an inmate was punished for the content of his permitted communication with another inmate, the Court of Appeals' analysis broke no new ground. It was fact-driven and depended in large part on the Petitioners' failure to offer evidence to demonstrate a connection between their punishment of Murphy and the penological interests they asserted.

It makes no difference whether Murphy's letter is characterized as advice from a jailhouse lawyer or the kind of advice people offer each other daily. He was punished for its contents, and the Petitioners demonstrated no rationale for the punishment.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JEFFREY T. RENZ
Criminal Defense Clinic
School of Law, University of Montana
Missoula, Montana 59812
(406) 243-4823
Counsel of Record

June 2006

JEFFREY T. RENZ
DAVID C. PECK, Legal Intern
Montana Defender Project
School of Law
University of Montana
Missoula, Montana 59812
(406) 243-4823
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA
(HELENA DIVISION)

KEVIN MURPHY, individually and on behalf of other persons similarly situated Plaintiffs, -v- ROBERT SHAW, Unit Sergeant, LARRY BEARELY, Hearings officer, MICHAEL MAHONEY and MYRON BEESON Bureau Wardens, and RICHARD DAY, Department of Corrections Director Defendants.	) No. CV 95-62-H-CCL)))))) AFFIDAVIT OF) KEVIN MURPHY))))))	

STATE OF MONTANA)
:ss
County of Powell)

I, KEVIN MURPHY, being first duly sworn state:

1. I am an inmate confined at Montana State Prison, Deer Lodge, Montana.

2. On or about February 16, 1995, I was working as an inmate law clerk while confined at Montana State Prison. A copy of my work assignment is attached hereto as Exhibit 1.

3. On or about February 1, 1995, a fellow inmate, Pat Tracy, had requested my

assistance, through another inmate, on charges pending against him for assaulting a prison officer. At this time Pat Tracy was housed in the Maximum Security wing and I was unable to see him personally. On or about February 16, 1995, I wrote a letter to Pat Tracy, in which I gave him legal advice concerning the charges pending against him. The letter attached to plaintiff's complaint as "Exhibit 1" is a true and accurate copy of this letter.

4. On or about February 17, 1995, Unit Sergeant Robert Shaw read the above mentioned letter.

5. As a result of the letter, defendant Shaw gave me three Major Misconduct Violation Reports or ("Class IIs"). In these Class IIs defendant Shaw alleged that based on the content of the letter, I violated Rules 009, 022 and 025. The Major Misconduct Violation Reports attached to plaintiff's complaint as "Exhibit 2" are true and accurate copies of those Class IIs.

6. Hearings officer Larry Bearley found me guilty of violating Rules 009 and 022 and sanctioned me to ten days suspended detention. As a result I also received three reclassification points.

7. Bureau Warden Mike Mahoney denied my appeal of the above mentioned disciplinary violations.

8. I know of other inmates at Montana State Prison who have been similarly harassed for providing legal assistance to other inmates.

FURTHER, AFFIANT SAYETH NOT.

Dated this 1st day of May, 1996.

/s/_____
Kevin Murphy

SUBSCRIBED AND SWORN to before me this 1st day of May, 1996.

/s/_____
Notary Public for the State of Montana
Residing at Deer Lodge, Montana
My Commission Expires 11-19-97

(Notarial Seal)

JEFFREY T. RENZ
SHARON M. NOEL, Legal Intern
Montana Defender Project
School of Law
University of Montana
Missoula, Montana 59812
(406) 243-4823
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA, MONTANA

KEVIN MURPHY, individually and on behalf of other persons similarly situated Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	) No. CV 95-62-H-CCL)))) SUPPLEMENTAL AFFIDAVIT) OF KEVIN MURPHY)))))

STATE OF MONTANA)
:ss
County of Powell)

Before the undersigned, a notary public for the State of Montana, personally appeared Kevin Murphy, who, having been duly sworn, on his oath deposes and says that this affidavit is made on his personal knowledge, and that if he were to appear as a witness in the above-captioned matter, he would competently testify as follows:

1. I am from Butte, Montana.

2. I am housed on the high security side of Montana State Prison.

3. I have assisted inmates in both the high security and maximum security units. This was true even during the period when the high security inmates did not go to maximum security. Although we could not go to the maximum security unit, we could still correspond with and assist inmates there. I had never been disciplined for doing this. All of this was done with the knowledge and approval of the library director and other members of the prison staff.

4. No one ever directed that I, or any other law clerk, stop providing or continuing to provide assistance to maximum security inmates or inmates in administrative segregation (lockdown).

5. On the high security side the process of providing assistance to inmates was informal. Sometimes inmates wanting legal assistance would send in a kite to the library director, Dave Beatty, and he would assign those inmates to a law clerk. Sometimes inmates would walk-in to the library during library hours and request assistance from Dave Beatty. In those cases the process was "first come, first served" unless the inmate asked one of the law clerks specifically for help. Finally, inmates sent in written requests addressed to a particular law clerk and that law clerk would respond directly.

6. I have a history of assisting Pat Tracy. Beginning in the mid-1980's, I assisted Pat in my capacity as an inmate law clerk with numerous writs and appeals in both the state and federal courts, including an appeal to the 9th Circuit.

7. In early 1995, I had been out of prison for a short time before Pat asked for my assistance. On or about February 1, 1995, I received a request from Pat for my assistance. I began to investigate the assault charges against Pat.

8. Through my investigation I found that Officer Galle had made homosexual comments to other inmates and that a petition was circulating accusing him of wrongful conduct and requesting his transfer.

9. On or about February 16, 1995, I wrote a letter to Pat Tracy to try and help him and get the charges dropped to a misdemeanor.

10. I was aware that Montana State Prison officials would read the contents of my letter to Pat Tracy. I did not believe that Officer Galle would read the letter. In fact, to this day, I do not think that Officer Galle has seen it.

FURTHER, AFFIANT SAYETH NOT.

Dated this 12TH day of July, 1996.

/s/_____
Kevin Murphy

SUBSCRIBED AND SWORN to before me this 12th day of July, 1996.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year hereinabove first written.

/s/_____
Notary Public for the State of Montana
Residing at _____, Montana
My Commission Expires _____

(Notarial Seal)

No. **99-1613**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ROBERT SHAW, LARRY BEARLEY,
MICHAEL MAHONEY, MYRON BEESON,
AND RICHARD S. DAY,

Petitioners,

-v-

KEVIN MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Kevin Murphy asks for leave to proceed without payment of costs and to proceed in forma pauperis. Respondent was granted leave to proceed in forma pauperis in the United States District Court for the District of Montana and in the United States Court of Appeals for the Ninth Circuit. Respondent submits his Affidavit in Support of Motion for Leave to Proceed *In Forma Pauperis*, filed in the United States District Court. His current affidavit and his current statement of account will be submitted when received from the Great Falls Regional Prison.

DATED: June 6, 2000

JEFFREY T. RENZ, Attorney for
Respondent, Counsel of Record.

FILED

JAN 30 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN MURPHY, individually and on behalf of others similarly situated, Plaintiff-Appellant, vs. ROBERT SHAW, Unit Sergeant; et al., Defendants-Appellees.	No. 97-35989 DC# CV-95-62-CCL Montana (Helena) ORDER

Appellant's motion to proced in forma pauperis is denied as unnecessary because appellant's in forma pauperis status continues on appeal. See Fed. R. App. P. 24(a). Pursuant to 28 U.S.C. §§ 1915(b)(1) and (2), however, appellant must pay the full amount of the filing and docketing fees for this appeal when funds are available in appellant's account.

Consequently, within 21 days of the entry of this order, appellant shall complete and **file with this court** the enclosed authorization form, which directs the prison officials at appellant's institution to assess, collect and forward to the court the $105 filing and docketing fees for this appeal on a monthly basis whenever funds exist in appellant's trust fund account. These fees will continue to be collected regardless of the date or manner of disposition of this appeal. 28 U.S.C. §§ 1915(b)(2) and (e)(2).

If appellant fails to comply with this order, the appeal will be dismissed automatically by the Clerk under 9th Cir. R. 42-1.

If appellant complies with the order, the briefing schedule is reset as follows: appellant's opening brief is due March 9, 1998; appellee's answering brief is due April 8, 1998; and the optional reply brief is due within 14 days after service of appellee's brief.

For the Court

Patricia Plunkett
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

clerk/1.98/97.35989

JEFFREY T. RENZ
Heather Latino, Intern
Montana Defender Project
School of Law
University of Montana
Missoula, Montana 59812
(406) 243-4823
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

KEVIN MURPHY, individually and on behalf of all other persons similarly situated, Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	No. CV 95-62-H-CCL AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF MONTANA)
:ss
County of Butte-Silverbow)

I, Kevin Murphy, being first duly sworn, depose and say that I am the Plaintiff in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress; that the issues which I desire to present on appeal are set out in the Civil Appeals Docketing Statement.

I further swear that the responses to the questions and

instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed?

ANSWER: No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

ANSWER: _____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

ANSWER: AUGUST 1994 - $100.00 WEEK

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

ANSWER: NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

ANSWER: _____

3. Do you own any cash or checking or savings account?

ANSWER: NO

a. If the answer is yes, state the total value of the items owned.

ANSWER: _____

4. Do you won any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: NO

a. If the answer is yes, describe the property and state its approximate value.

ANSWER: _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER: NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dawn T. Murphy

SUBSCRIBED and SWORN to before me this 30 day of October,

1997.

NOTARY PUBLIC, State of Montana
Residing at BUTTE MONTANA
My Commission Expires: 4/98

ATTACH A COPY OF YOUR INSTITUTIONAL TRUST FUND ACCOUNT STATEMENT